APPEAL NO. 93066

On December 17, 1992, a contested case hearing was held in (city), Texas, with hearing officer presiding as the hearing officer. The hearing officer determined that respondent (claimant herein) was injured in the course and scope of her employment with her employer, when she was injured in an automobile accident on (date of injury); and further determined that the claimant had disability from (date of injury) through November 3, 1992. The hearing officer decided that the claimant is entitled to workers' compensation benefits in accordance with his decision, the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. art. 8308-1.01 et. seq. (Vernon Supp. 1993) (1989 Act), and the rules of the Texas Workers' Compensation Commission. The appellant (carrier herein) contends that the hearing officer's conclusion and decision that the claimant was injured in the course and scope of her employment are based on insufficient evidence and are against the great weight and preponderance of the evidence.

DECISION

The decision of the hearing officer is affirmed.

The parties stipulated that on (date of injury), the claimant was an employee of the employer and the carrier was the employer's workers' compensation insurance carrier.

The claimant was injured in an automobile accident on (date of injury). The issues before the hearing officer were whether the claimant was in the course and scope of her employment when she was injured in the accident, and whether the claimant has disability.

The employer is an insurance company. Mr. E is a district manager for the employer and the claimant is an account executive for the employer. Mr. E testified that the claimant's duties include selling insurance, servicing clients' policies, and collecting insurance premiums. The claimant uses her personal car in visiting clients and makes her own daily work schedule. Mr. E said that account executives come into the office about 9:00 a.m. or 10:00 a.m. and that the time they get off work varies depending on what is on their schedule for that day. He said that account executives can be collecting premiums and interviewing prospective clients after 5:00 p.m. and that sometimes account executives work until 9:00 p.m. or 10:00 p.m. He testified that an account executive's daily work schedule is flexible. He said that the claimant was off of work after her accident until November 1992 when she was released by a doctor to full time work and that she has worked full time at the same salary she made before her injury since returning to work in November. He said that the claimant told him after her accident that she was working when the accident occurred.

In a recorded statement taken by the carrier's claims adjustor on August 25, 1992, the claimant said she makes out her own work schedule and leaves the work schedule with her manager. She also stated that she tells her manager where she's going and who she is going to see and the manager says "okay, fine you go see him." The claimant testified at the hearing that she left the office between 10:30 and 11:30 a.m. on (date of injury) to

perform the work schedule she had made for that day. The work schedule was in evidence. It shows the names of six individuals. The third name on the list is VC and the last name on the list is V. L. D. Unfortunately, the preprinted time of day listed next to each name was only partially copied on the exhibit so the hour of each appointment is not shown. The claimant said that Ms. C appointment was at 3:30 p.m. and Ms. D' appointment was at 5:30 p.m. She was to interview Ms. C for an insurance policy and collect a premium from Ms. D. The claimant said that Ms. C was not at home when she went to Ms. C house at 3:30 p.m. The claimant's work schedule shows that between her 3:30 appointment with Ms. C and her 5:30 appointment with Ms. D she had two other appointments. There was no testimony concerning those appointments.

The claimant testified that she went to Ms. D' house at 5:30 p.m. and it took her 15 to 20 minutes to collect the premium. The claimant testified that it was her intention to head home, but that she thought she had enough time to "reschedule" Ms. C appointment so she decided to return to Ms. house and interview Ms. C before picking up her baby at the babysitter's house at 6:30 p.m. The claimant identified the locations of her own house, her babysitter's house, Ms. D' house, Ms. C house, and the location of her accident on a map which was in evidence. The claimant said that her own house is about three blocks from her babysitter's house. Ms. D' house is shown as being located northwest of the claimant's house and the babysitter's house, and Ms. C house is shown as being located southeast of the claimant's house and the babysitter's house. The claimant's house and the babysitter's house are approximately midway between Ms. D' house and Ms. C house. The claimant testified that in going to Ms. C house after collecting the premium from Ms. D, she used a street which connects both with the street her house is on and the street the babysitter's house is on, and that in using this street she went by her own house and her babysitter's house, but did not stop at either of those houses. She said she used this street instead of the freeway because of traffic on the freeway. She said she continued down the street until she got to another street which goes across town to the street Ms. C lives on. The claimant said she was driving on the crosstown street in a direction away from her house and the babysitter's house and towards Ms. C house when she had a car accident about one block from Ms. Cs house. The police accident report was not in evidence. The claimant said that she never made it to Ms. C house. On the map that was in evidence, the accident is shown as having occurred at an intersection of the crosstown street and another street approximately four miles southeast of the claimant's house and the babysitter's house and approximately one-half mile west of Ms. C house. The claimant said the accident happened between 5:45 p.m. and 6:15 p.m. She testified that if she had made it to Ms. C house, she would have used the freeways to get home. She explained that the freeway would not have been as congested going to her house from Ms. C house because most traffic would be going in the opposite direction away from the city at that hour. The claimant explained that, by taking the crosstown street to Ms. C house and then taking the freeway back from Ms. C house to her babysitter's house, she would have simply been making a circle.

A medical report indicates that the claimant was taken by ambulance from the accident site to a hospital. Thereafter she went to Dr. M whose diagnoses included a flexion/extension injury to the neck, an acute lumbar strain, and an acute musculo-ligamentous strain to the shoulder/quadratus. Dr. M released the claimant to return to work on November 3, 1992. The claimant testified that she has worked full time at her preinjury salary since she was released to return to work.

The claimant acknowledged that in her recorded statement given on August 25, 1992, she said that when she had her accident she had just left a client's house and was on her way home. The transcription of the statement, which was in evidence, also records that the claimant said that "that was just the way that I went because I was picking my baby up from the babysitter," and that the last client she saw was Ms. D. The intersection she identified as the place of the accident in her recorded statement is the same intersection she identified as the place of the accident at the hearing. At the hearing, the claimant testified that she didn't tell the claims adjustor about having her accident on the way to interview Ms. C for the purpose of selling her insurance because "it didn't matter on that."

Article 8308-1.03(12) provides as follows:

"Course and scope of employment" means an activity of any kind or character that has to do with and originates in the work, business, trade, or profession of the employer and that is performed by an employee while engaged in or about the furtherance of the affairs or business of the employer. The term includes activities conducted on the premises of the employer or at other locations. The term does not include:

(A)transportation to and from the place of employment unless:

(i)the transportation is furnished as a part of the contract of employment or is paid for by the employer;
(ii)the means of such transportation are under the control of the employer; or
(iii)the employee is directed in his employment to proceed from one place to another place; or

(B)travel by the employee in the furtherance of the affairs or business of his employer if such travel is also in furtherance of personal or private affairs of the employee unless:

(i)the trip to the place of occurrence of the injury would have been made even had there been no

personal or private affairs of the employee to be furthered by the trip;
and
(ii)the trip would not have been made had there been no affairs or business of the employer to be furthered by the trip.

The hearing officer made the following findings of fact and conclusion of law concerning the issue of course and scope of employment:

FINDINGS OF FACT

4.On 4 August 1992, [the claimant] was driving to the house of Ms. VC to interview Ms. Clark for [the employer].

5.[The claimant] had an automobile accident on the way to Ms. VC residence at about 6:00 on the evening of 4 August 1992.

6.[The claimant] suffered an injury to her back, neck, and shoulder in an automobile accident on 4 August 1992 at about 6:00 p.m.

7. [The claimant's] travelling to the place where the automobile accident occurred would have been made even had [the claimant] had no personal or private affairs to be furthered, and [the claimant] would not have made the trip to the place where the accident occurred had there been no business affairs of [the employer] to be furthered by the trip.

8. [The claimant] was engaged in outside sales and collections, and travel was part of her job description.

CONCLUSION OF LAW

4.Because [the claimant] has shown by a preponderance of the evidence that when she had an injury in an automobile accident on 4 August 1992, her trip to the place of the occurrence of the injury would have been made even if she had had no personal or private affairs to be furthered by the trip, and the trip would not have been made had there been no affairs or business of the employer to be furthered by making the trip, and she has shown the automobile accident occurred in the course and scope of her employment, within the meaning of Article 8308-1.03(12), and (sic) the carrier is liable for benefits under Article 8308-3.01.

The hearing officer decided that the claimant suffered an injury on (date of injury) within the course and scope of her employment. The carrier contends that the hearing

officer's conclusion of law and decision that the claimant's injury was sustained in the course and scope of her employment are based on insufficient evidence and are against the great weight and preponderance of the evidence.

The hearing officer applied the "dual purpose rule" found in Article 8308-1.03(12)(B) to the facts of this case. The dual purpose rule was construed by the Texas Supreme Court in Johnson v. Pacific Employers Indemnity Company, 439 S.W.2d 824, 827 (Tex. 1969) where the court stated "the rule can only be invoked when injury is sustained during the course of travel which furthers both the affairs or business of the employer and the personal or private affairs of the employee." If the only benefit of the travel is for the employer, then the dual purpose doctrine does not arise. Nor may the rule be invoked when injury occurs during the course of travel which is not in furtherance of the affairs or business of the employer. Johnson, *supra*. In applying the dual purpose rule, the hearing officer apparently determined that the claimant's travel furthered the affairs of the employer and the personal affairs of the claimant. Given the apparent conflict between the claimant's testimony at the hearing and her recorded statement concerning the purpose of her travel, we cannot conclude that the hearing officer erred in applying the dual purpose rule. The hearing officer resolves conflicts in the testimony of a witness. *See* McGalliard v. Kuhlmann, 722 S.W.2d 694 (Tex. 1987). When both the furtherance of the affairs or business of the employer and the furtherance of the employee's personal or private affairs are involved, the two-prong test of the dual purpose doctrine comes into play. That is, the injury is not in the course and scope of employment unless the trip to the place of the occurrence of the injury would have been made even if there had been no personal or private affair of the employee to be furthered by the trip and unless the trip would not have been made except for the business purpose. Wausau Underwriters Insurance v. Potter, 807 S.W.2d 419 (Tex. App. - Beaumont 1991, no writ).

Having reviewed the record, we conclude that there was sufficient evidence to support the hearing officer's findings and conclusion that the trip to the place of occurrence of the injury would have been made even had there been no personal or private affairs of the claimant to be furthered by the trip; that the trip would not have been made had there been no affairs or business of the employer to be furthered by the trip; and that the claimant's accident occurred in the course and scope of her employment. The hearing officer is the sole judge of the relevance and materiality of the evidence offered and of the weight and credibility to be given the evidence. Article 8308-6.34(e). Whether an injury is incurred within the course and scope of employment is a question of fact. Texas Employers Insurance Association v. Anderson, 125 S.W.2d 674 (Tex. Civ. App. - Dallas 1939, writ refused). In our opinion, the hearing officer could reasonably conclude from the claimant's testimony and the map that was in evidence that the claimant's job required her to travel in order to sell insurance; that the claimant did not have to proceed to Ms. Cs house to pick up her baby at the babysitter's house; that Ms. C house is several miles from the babysitter's house; that if the claimant did not have to pick up her baby, she would have done just as

she did, that is, the claimant would have passed her babysitter's house without stopping in order to proceed to Ms C house to sell insurance; and that if the claimant was not going to sell insurance to Ms. C, she would have simply stopped at the babysitter's house when she reached that location and not proceeded on to Ms. C house. We do not substitute our judgement for that of the hearing officer where, as here, the findings and conclusions are supported by sufficient evidence, and are not so against the great weight and preponderance of the evidence as to be clearly wrong and manifestly unjust. Texas Employers Insurance Association v. Alcantara, 764 S.W.2d 865 (Tex. App. - Texarkana 1989, no writ); Texas Workers' Compensation Commission Appeal No. 92227, decided July 20, 1992. The conflict between the testimony of the claimant and the claimant's recorded statement was for the hearing officer to resolve. Garza v. Commercial Insurance Company of Newark, N.J., 508 S.W.2d 701 (Tex. Civ. App. - Amarillo 1974, no writ). The hearing officer can believe all, part, or none of the testimony of any one witness. Taylor v. Lewis, 553 S.W.2d 153 (Tex. Civ. App. - Amarillo 1977, writ ref'd n.r.e.). The hearing officer can give credence to testimony even if there are some admitted discrepancies in the testimony and previous testimony. Texas Employers' Insurance Association v.

Stephenson, 496 S.W.2d 184 (Tex. Civ. App. - Amarillo 1973, no writ); Texas Workers' Compensation Commission Appeal No. 92069, decided April 1, 1992.

The decision of the hearing officer is affirmed.

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Robert W. Potts
Appeals Judge

CONCUR:

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Lynda H. Nesenholtz
Appeals Judge

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Thomas A. Knapp
Appeals Judge